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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN  
OF THE WORLD LIFE INSURANCE SOCIETY and  
STROMBERG-CARLSON TELEPHONE MANUFACTURING  
COMPANY,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA and the FEDERAL  
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

*Intervenor.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR APPELLANT WOODMEN OF THE WORLD  
LIFE INSURANCE SOCIETY**

DAVID M. WOOD,

*Solicitor for Woodmen of the World  
Life Insurance Society*

*Of Counsel:*

JOHN B. DAWSON



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the Commission, or otherwise the inevitable result will be the indirect control by the Commission of any number of indefinable matters over which Congress or no one else would want the Commission to have control. Moreover any attempt of the Commission to expand its powers beyond those specifically enumerated in the act violates the First Amendment, and Article I, Section 1, of the Constitution of the United States.

#### POINT IV.

#### CONCLUSION.

Appellant submits that the Order in question is beyond the authority of the Commission and arbitrary and capricious. The District Court erred in dismissing the complaint without a trial upon the arbitrary and capricious character of the Order.

Respectfully submitted,

DAVID M. WOOD,

*Solicitor for Woodmen of the  
World Life Insurance Society*

*Of Counsel,*

JOHN B. DAWSON

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**BRIEF FOR APPELLANT WOODMEN OF THE  
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Appellant Woodmen of the World Life Insurance So-  
ciety, co-appellant in case No. 554, joined as a party plain-  
tiff in the suit brought by National Broadcasting Company,  
Inc. (hereinafter called NBC) because of the legal question







at the outset as to whether NBC had standing to sue on its own behalf, inasmuch as the Order complained of was, by its terms, directed against the licensing of the individual stations comprising the NBC network rather than against NBC itself. It was recognized by the independent stations affiliated with NBC that the validity of the Order could best be tested through the organization and facilities of NBC, and that an action by NBC would, to all intents and purposes, be in the nature of a class suit. This appellant joined in the suit in order to protect its license as an operator of an independent standard broadcast station, in the event the Court might hold that NBC was without standing to sue.

Although the question of the standing of NBC to bring this suit has been obviated by the decision in this Court rendered June 1, 1942, with respect to the jurisdiction of the District Court, this appellant nevertheless wishes to state its position on the validity of the Order complained of, which position this appellant believes is representative of the position of other operators of independent radio stations affiliated with NBC.

The brief for appellant NBC filed concurrently herewith adequately sets forth the manner in which this appeal is before this Court, the facts with respect to network broadcasting, the power asserted by the Commission, the nature of the Order involved, and the errors of the Court below. These matters will not be repeated in this brief.

It is also not the purpose of this brief to repeat the legal arguments contained in the brief of appellant NBC, but said brief has been read and is fully concurred in by appellant Woodmen of the World Life Insurance Society.

The argument upon the law and facts contained in said brief is adopted *in toto* by this appellant as its argument, and the only addition thereto herein will be to present the views of this appellant on the facts peculiarly pertinent to this appellant, and to point out the irreparable damage which will occur to this appellant if the Order complained of is permitted to stand.

### Statement

The appellant Woodmen of the World Life Insurance Society is a fraternal benefit corporation organized and existing under the laws of the State of Nebraska and having its principal office in the City of Omaha in said State. It owns and has continuously operated a standard broadcasting station known as WOW located in the City of Omaha, Nebraska, since April 2, 1923 under licenses issued by the Federal Radio Commission and its successor, the defendant Federal Communications Commission. These licenses were issued upon findings as required by the statute that the public interest, convenience and necessity would be served thereby, and this appellant is now, and at all times since 1923 has been, duly qualified legally, financially, technically and by experience, and in all other respects, to operate said station WOW. Station WOW is now and has been since 1927 an affiliate of the NBC network. Its present contract of affiliation is similar to the contract which is in evidence here (R. 255).

In addition to broadcasting network programs transmitted by NBC over its network, appellant's station WOW broadcasts many programs which it originates itself. Ap

proximately half of the broadcasts of station WOW are network programs, and the revenue derived by this appellant from the broadcasting of network programs has consistently amounted for several years to sums in excess of \$100,000 per annum (R. 256).

This appellant's radio station WOW during its approximately twenty years of operation has, by the superiority of the programs broadcast by it, acquired great popularity with the millions of the radio audience in the territory adjacent to the City of Omaha, Nebraska, and in the several States covered by its broadcasting facilities. The size of this listening audience and the popularity of the station and, consequently, its ability to produce income and revenues from the sale of time for advertising, is due in large measure to the high quality of the sustaining and commercial programs received by station WOW from NBC through its network (R. 256, 257). Without the aid of the organization and facilities of NBC in furnishing high quality sustaining and commercial programs this appellant would be required to incur great additional expense in personnel, equipment and facilities to provide programs of the same high quality and standard as those furnished by NBC (R. 257). This potential threat to the revenue producing ability of station WOW imperils this appellant's investment in said station of assets, other than good will, having a present value in excess of \$175,000, and values in good will and as a going concern created during its approximately twenty years of operation in excess of \$500,000. (R. 258, 256).

**Argument****POINT I.**

THE ORDER COMPLAINED OF WILL CAUSE IRREPARABLE DAMAGE TO APPELLANT, WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, AND BEARS NO REASONABLE RELATION TO THE STANDARDS AND OBJECTIVES OF THE COMMUNICATIONS ACT OF 1934, AND IS ARBITRARY AND CAPRICIOUS.

The order complained of is obviously directed at certain business practices of the NBC network, and the major controversy in this case is between the two agencies most influential in the radio broadcasting industry, the networks and the Federal Communications Commission. NBC contends that the business practices adversely affected by the order are beneficial to the radio advertising industry, productive of both commercial and sustaining radio programs of high quality, and essential to the continuation of the existence of national networks, and the Federal Communications Commission takes the view that such practices are inimical to the public good. In between these parties stand the independent operators of standard radio broadcasting stations such as the appellant Woodmen of the World Life Insurance Society, and it is the main purpose of this brief to call to the attention of the Court with as much force as possible the attitude of these stations to the controversy in this case.

The interests of the independent operators of standard radio broadcasting stations are directly affected by the

order, for it is through the medium of the licensing of these individual stations that the Commission has attempted to strike at the networks. The order complained of, broadly speaking, prohibits the licensing of such stations having affiliation contracts with networks in the form set forth in the order.

#### **BENEFITS TO PUBLIC AND STATION UNDER AFFILIATION CONTRACT**

At the outset this appellant desires to inform the Court that it feels that it is under no disability by reason of its affiliation contract with NBC. It has had such a contract continuously since 1927 (R. 256). On the contrary it has considered that the benefits flowing to the station from the affiliation far outweigh any disadvantages that might have obtained under the contract, as evidenced by the continuity of the relationship extending over a period of approximately sixteen years. This appellant could have terminated the affiliation if it had desired to do so. There is no question but that the contract has been an asset of proven value to this appellant.

The advantages are twofold. First, appellant's station has been receiving from NBC and broadcasting for many years the finest type of commercial programs, and has received consistently for several years as revenue from the broadcasting of such commercial programs from the NBC network sums in excess of \$100,000 per annum. Second, appellant's station has had access to and has broadcast without cost to its station sustaining programs transmitted by NBC over its network of a quality which appellant, in its individual capacity, would be unable to match without



great additional expense, and, as to some sustaining programs, which appellant could not be able to equal at any expense.

As a result of the services rendered to appellant's station by NBC under its affiliation contract, station WOW has, by the superiority of the programs broadcast by it, acquired great popularity with the radio audience in the area covered by its facilities, and it has been a financially successful operation for appellant. The popularity of the station is the best evidence of the satisfaction of the listening public to the type of programs submitted through the NBC network, and is undeniable proof that the listening public is contented with the material it receives through the facilities of station WOW. Appellant has further profited from the popularity of its station with the listening public by obtaining from time to time increases in business from the network, and by demand for radio time over its station for local commercial enterprises and national spot programs which are sold direct to advertising customers without the medium of the network.

Appellant feels that it is in close contact with its listening audience. It receives daily hundreds of communications from its listeners commenting upon programs broadcast by its station and has used various service agencies to sound out and determine the type of programs preferred by its listeners. Every effort has been made to conform its programs to the desires of its listeners, as the popularity of the station measures its power to earn revenues from its commercial advertising. The efforts on the part of appellant to please its listening audience have in nowise been detrimentally affected by its affiliation contract with NBC.

To sum up the effect the affiliation contract with NBC has had upon the operations of appellant's station in the past, appellant states that the popularity of the station attests the satisfaction of the public with the quality of the sustaining and commercial programs broadcast by it, and further that the operation has been a successful and profitable business venture for it.

#### **EFFECT OF ORDER ON FUTURE STATION OPERATIONS AND ON PUBLIC**

If the order complained of is permitted to stand, the ability of NBC to produce the same high quality commercial programs will be seriously impaired, as is so ably argued in the brief of appellant NBC. The impairment of the network's ability in the commercial end of the business will naturally affect its ability to produce and supply sustaining programs of a quality comparable to those produced in the past. It will, therefore, devolve upon the individual standard radio broadcasting stations to provide to a much greater extent their own commercial and sustaining programs. Each individual station will be required to provide its own personnel, equipment and facilities equal to those which are now available to it through the organization and facilities of NBC. Obviously the expense of the individual stations will be increased many fold. Certain high quality sustaining programs now produced by NBC at tremendous expense, such as the NBC symphony orchestra, will not be available to the individual stations, and some of them would not be available at any cost. For instance, there is only one Toscanini, or Lily Pons, or



Lawrence Tibbett, or many other artists that NBC has made available to network stations on sustaining programs in the past. The services of these artists are beyond the means of individual stations; their services would be acquired exclusively by larger stations whose income would be ample to obtain their services, and many millions of radio listeners would be deprived of the pleasure of listening to the performances of such artists. Events of national importance of interest to radio listeners everywhere are occurring today in every part of the United States and of the world, and the expense of obtaining on-the-spot descriptions and broadcasts of such events would be prohibitive to individual stations.

In addition to the difficulties outlined above in obtaining sustaining and national interest programs of high quality, the ability of standard radio broadcasting stations to contract for national commercial advertising programs would require a tremendous increase in the expense of operating such stations. Under present operations, the facilities and the highly trained organizations of the networks are competing for this type of business on behalf of not only the networks, but of various independent stations affiliated with them. This does not mean that the competition for such advertising is not keen, but the expense of providing an organization to compete for such contracts is distributed equitably among the networks and their affiliates, so that each station is not required to maintain a large organization and representatives in various centers of population throughout the country, where most national radio advertising contracts are let in order for such individual stations to obtain participation therein. The advantages accruing

to the networks and to the national advertisers are fully presented in the brief of appellant NBC but when the effects of disintegration of the business organization of the networks there noted are applied to the individual stations, the result is magnified many times. Most individual stations would not be financially able to obtain contracts in any way near the volume now available to them, and the resulting loss in revenues would be substantial. There is at present no method of replacing such lost revenues, to the irreparable damage of such stations. This appellant submits that it will likewise suffer irreparable damage if it is deprived of the facilities and organization for obtaining national programs now available to it through the NBC network.

If the order complained of is permitted to stand, and, as this appellant believes and asserts, the foregoing conditions will result, the enjoyment and education of the radio audience and the programs available to them will be materially lessened and the earning capacity of the individual stations will be seriously and irreparably impaired. The values, both physical and in good will, built into appellant's station through its twenty years of operation will be materially reduced, and this appellant will suffer a loss in the destruction of such value. However, the public will be the real losers by the lowering of the quality of the programs available to them.

## POINT II.

APPELLANT WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND OTHER OPERATORS OF INDEPENDENT STANDARD RADIO BROADCASTING STATIONS WERE NOT MADE AWARE OF THE PURPOSE OF THE COMMISSION'S HEARINGS ON CHAIN BROADCASTING.

When the Commission instituted hearings on chain broadcasting in 1938 appellant assumed that the hearings would follow the usual pattern of such hearings and concern only the technical side of chain broadcasting, and a determination as to whether the public interest, convenience or necessity was being served by network broadcasting. Appellant, like other individual operators of standard broadcasting stations, is not equipped to follow in detail protracted hearings by the Commission, and the order complained of in this proceeding came as a considerable surprise to the appellant, and it must have come as a considerable surprise to many other operators of individual stations.

The report on chain broadcasting of the Commission deals almost solely with the creation of the various networks and the operation and business relationships of the networks with commercial advertisers, with particular emphasis on the competition of the networks for station affiliation. It ignores completely the desires of the operators of independent standard radio broadcasting stations and the listening public. It also ignores the desires of the sponsors of the commercial programs which make the broadcasting

industry a profitable business enterprise. Stripped of all legal formalities and camouflage, the practical effect of the order of the Commission is to attempt to assist the Mutual Broadcasting System to obtain a wider coverage for its advertising customers than it has at the present time, at the expense of the older networks.

Those in the radio broadcasting industry know that the competition between the networks for radio advertising business is keen, and that the competition for the local radio audiences and local radio advertising business between independent standard radio broadcasting stations is equally keen. To keep and build station popularity with their own radio audiences, local stations have in the past, and will in the future, affiliate with the networks offering consistently the best facilities, organizations and programs. In its own sphere in the industry, appellant is surrounded by competitive stations, and if appellant had felt that its radio audience and its own best interests would have been benefited by severing its affiliation with the NBC network and operating independently of any network, or joining a competitive network, it has had many opportunities to move either way. It is this competition between the networks for the national radio advertising business, and the competition between the networks and individual stations for station audiences, that has built and maintained the present high quality sustaining and commercial programs. Appellant NBC contends that it cannot satisfactorily operate without option time. This will mean that the burden and expense to the local independent stations of supplying satisfactory sustaining and commercial programs will be greatly increased.

## POINT III.

APPELLANT WOODMEN OF THE WORLD  
LIFE INSURANCE SOCIETY CONCURS IN THE  
ARGUMENTS SET FORTH IN THE BRIEF OF  
APPELLANT NATIONAL BROADCASTING  
COMPANY, INC.

Appellant submits that the Commission has overstepped the limits of the jurisdiction conferred upon it by Congress, and that it is of vital importance to the public and to the owners of independent standard broadcasting stations that the Order complained of be set aside. The very form of the Order complained of, directed as it is against the licensing of individual stations, though intended as a blow at the national networks, is proof of the circumventing of the limits imposed by Congress, to strike at business organizations and practices over which Congress never intended the Commission should have control. If Congress had intended to authorize the Commission to regulate such business organizations and practices, it would have included express language in the Communications Act of 1934, effecting that intention, for all the practices now complained of by the Commission were in effect when that act was passed. In prohibiting the operation of a radio broadcasting station without a license from the Commission, Congress gave to the Commission the power of life and death over every broadcasting station in the country. This broad power must, therefore, be limited to the purposes for which it was granted by Congress, and every attempt to exercise that power must be construed strictly against